



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R06-OAR-2013-0616; FRL-9927-23-Region 6]

Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP) for Albuquerque-Bernalillo County; Prevention of Significant Deterioration (PSD) Permitting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve two revisions to the New Mexico State Implementation Plan (SIP) to update the Albuquerque-Bernalillo County Prevention of Significant Deterioration (PSD) SIP permitting program consistent with federal requirements. New Mexico submitted the Albuquerque-Bernalillo County PSD SIP permitting revisions on July 26, 2013, and March 4, 2015, which included a request for parallel processing of the submitted 2015 revisions. These submittals contain revisions to address the requirements of the EPA's May 2008, July 2010, and October 2012 PM_{2.5} PSD Implementation Rules and to incorporate revisions consistent with the EPA's March 2011

Fugitives Interim Rule, July 2011 Greenhouse Gas (GHG) Biomass Deferral Rule, and July 2012 GHG Tailoring Rule Step 3 and GHG PALs Rule. The EPA is proposing to find that these revisions to the New Mexico SIP meet the Federal Clean Air Act (the Act or CAA) and EPA regulations, and are consistent with EPA policies. We are proposing this action under section 110 and part C of title I of the Act. The EPA is not approving these rules within the exterior boundaries of a reservation or other areas within any Tribal Nation's jurisdiction.

DATES: Written comments should be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket No. EPA-R06-OAR-2013-0616, by one of the following methods:

- *www.regulations.gov*: Follow the online instructions.
- Email: Ms. Ashley Mohr at *mohr.ashley@epa.gov*.
- Mail or delivery: Ms. Ashley Mohr, Air Permits Section (6PD-R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202-2733.

Instructions: Direct your comments to Docket ID No. EPA-R06-OAR-2013-0616. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through *www.regulations.gov* or email, if you believe that it is CBI or otherwise protected from disclosure. The *www.regulations.gov* website is an "anonymous

access” system, which means that the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov*, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD-ROM submitted. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters and any form of encryption and should be free of any defects or viruses.

Docket: The index to the docket for this action is available electronically at *www.regulations.gov* and in hard copy at EPA Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas. While all documents in the docket are listed in the index, some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI).

FOR FURTHER INFORMATION CONTACT: Ms. Ashley Mohr, (214) 665-7289, *mohr.ashley@epa.gov*. To inspect the hard copy materials, please schedule an appointment with Ms. Ashley Mohr or Mr. Bill Deese at (214) 665-7253.

SUPPLEMENTARY INFORMATION: Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

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I. Background

The Act at section 110(a)(2)(C) requires states to develop and submit to the EPA for approval into the State Implementation Plan (SIP), preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants for attainment and nonattainment areas that cover both major and minor new sources and modifications, collectively referred to as the New Source Review (NSR) SIP. The Clean Air Act (CAA) NSR SIP program is composed of three separate programs: Prevention of Significant Deterioration (PSD), Nonattainment New Source Review (NNSR), and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the National Ambient Air Quality Standards (NAAQS) – “attainment areas” – as well as areas where there is insufficient information to determine if the area meets the NAAQS – “unclassifiable areas.” The NNSR SIP program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – “nonattainment areas.” The Minor NSR SIP program addresses construction or modification activities that do not emit, or have the potential to emit, beyond certain major source thresholds, and thus do not qualify as “major” and applies regardless of the designation of the area in which a source is located. The EPA regulations governing the criteria

that states must satisfy for EPA approval of the NSR programs as part of the SIP are contained in 40 CFR 51.160 - 51.166.

A. New Mexico's SIP Submittals

Since the EPA's last SIP approval on September 19, 2012, of PSD SIP requirements for Albuquerque-Bernalillo County,¹ the State of New Mexico has submitted two revisions to the Albuquerque-Bernalillo County PSD program: (1) a SIP revision submittal dated July 26, 2013, which affects sixteen sections under 20.11.61 NMAC; and (2) a request for parallel processing of a SIP revision dated March 4, 2015, which affects two sections under 20.11.61 NMAC.

i. *Summary of the January 26, 2013, SIP Submittal*

The July 26, 2013, SIP submittal contains revisions to adopt and implement: (1) the EPA's 2008 NSR PM_{2.5} Rule, (2) the EPA's 2010 PM_{2.5} PSD Increment—Significant Impact Levels (SILs)—Significant Monitoring Concentration (SMC) Rule, (3) the EPA's 2012 PM_{2.5} NSR Implementation Rule, (4) the EPA's 2011 Fugitives Interim Rule, (5) the EPA's 2011 Biomass Deferral Rule, and (6) the EPA's 2012 GHG Tailoring Rule Step 3 and GHG PALs Rule. The July 2013 submittal from New Mexico also contains other non-substantive revisions to the Albuquerque-Bernalillo County PSD program that are not directly associated with the incorporation of the EPA Rules. As part of this proposed rulemaking, the EPA is addressing these non-substantive revisions and the substantive revisions to the New Mexico SIP that were submitted to adopt and implement the six aforementioned rulemakings by the EPA.

ii. *Summary of the March 4, 2015, SIP Submittal*

On March 4, 2015, New Mexico submitted a request for the parallel processing of additional SIP revisions to the Albuquerque-Bernalillo County PSD program. This means that

¹ See 77 FR 58032.

the EPA is proposing approval of the submitted revisions at the same time that the public comment and rulemaking process is taking place at the state and local level. These proposed revisions to part 61 are being made in response to comments the EPA provided on the July 26, 2013, SIP submittal. Specifically, the March 2015 parallel processing request contains proposed revisions to Section 7 – Definitions and Section 11 – Applicability. New Mexico’s parallel processing request was made in accordance with paragraph 2.3.1 of appendix V to 40 CFR part 51. As part of this proposed rulemaking, the EPA is addressing the proposed revisions to the New Mexico SIP contained in the March 4, 2015, parallel processing request. As required by paragraph 2.3.2 of appendix V to 40 CFR part 51, the EPA will not take final action on the proposed revisions contained in the March 4, 2015, submittal until the final SIP revision submittal containing these revisions to the Albuquerque-Bernalillo County PSD program as a final adoption is received from New Mexico. Therefore, the EPA is proposing to approve the SIP revision request after the completion of the state public process and final submittal. More information regarding the anticipated timeline of the state’s rulemaking process is contained in the TSD accompanying this proposed action.

B. Relevant EPA Rulemakings

i. Summary of the EPA’s 2008 NSR PM_{2.5} Rule

On May 8, 2008, the EPA finalized the NSR PM_{2.5} Rule to implement the PM_{2.5} NAAQS. See 73 FR 28321. As a result of the EPA’s final NSR PM_{2.5} Rule, states were required to submit applicable SIP revisions to the EPA no later than May 16, 2011, to address this Rule’s PSD and NNSR SIP requirements. With respect to PSD permitting, the SIP revision submittals are required to meet the following PSD SIP requirements to implement the PM_{2.5} NAAQS: (1)

require PSD permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) establish significant emission rates for direct $PM_{2.5}$ and precursor pollutants (including SO_2 and NO_X); and (3) account for gases that condense to form particles (condensables) in $PM_{2.5}$ and PM_{10} emission limits in PSD permits.

Prior to the adoption of the revisions included in the July 26, 2013, SIP submittal, the Albuquerque-Bernalillo County Air Board adopted revisions to 20.11.61 NMAC to incorporate all but one of the amendments consistent with the EPA's 2008 NSR $PM_{2.5}$ Rule. These revisions were approved by the EPA on September 19, 2012. See 77 FR 58032. New Mexico's July 26, 2013, SIP revision submittal incorporates the final remaining amendment to 20.11.61 NMAC to be consistent with the revisions to the federal rules at 40 CFR 51.166(i)(5) contained in the EPA's 2008 rulemaking. Specifically, the July 2013 SIP submittal amends 20.11.61 NMAC to include an additional exemption that gives the department discretion to exempt a stationary source from air monitoring requirements for a particular pollutant. The EPA finds that New Mexico's July 26, 2013, SIP revision submittal is consistent with the 2008 NSR $PM_{2.5}$ Rule for PSD and meets the requirements of section 110 and part C of the CAA.

ii. Summary of the EPA's 2010 $PM_{2.5}$ PSD Increment—SILs—SMC Rule

On October 20, 2010, the EPA finalized the $PM_{2.5}$ PSD Increment—SILs—SMC Rule to provide additional regulatory requirements under the PSD SIP program regarding the implementation of the $PM_{2.5}$ NAAQS for NSR. See 75 FR 64864. As a result, the $PM_{2.5}$ PSD Increment—SILs—SMC Rule required states to submit SIP revisions to adopt the required PSD increments by July 20, 2012. Specifically, the SIP rule requires a state's submitted PSD SIP revision to adopt and submit for the EPA approval the $PM_{2.5}$ increments pursuant to section

166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS. States could also discretionarily choose to adopt and submit for EPA approval SILs used as a screening tool (by a major source subject to PSD) to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment and a SMC, (also a screening tool) used by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of PM_{2.5}. More detail on the PM_{2.5} PSD Increment—SILs—SMC Rule can be found in the EPA’s October 20, 2010, final rule. See 75 FR 64864.

(a) What are PSD Increments?

Under section 165(a)(3) of the CAA, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility “will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant.” In other words, when a source applies for a PSD SIP permit to emit a regulated pollutant in an attainment or unclassifiable area, the permitting authority implementing the PSD SIP must determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the “maximum allowable increase” of an air pollutant allowed to occur above the applicable baseline concentration² for that pollutant. PSD increments prevent air quality in attainment and unclassifiable areas from deteriorating to the level set by the NAAQS. Therefore, an increment is the mechanism used to estimate “significant deterioration” of air quality for a pollutant in an area.

² Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the same air quality at the time of the first application for a PSD permit in the area.

For PSD baseline purposes, a baseline area for a particular pollutant emitted from a source includes the attainment or unclassifiable/attainment area in which the source is located as well as any other attainment or unclassifiable/attainment area in which the source's emissions of that pollutant are projected (by air quality modeling) to result in an ambient pollutant increase of at least 1 $\mu\text{g}/\text{m}^3$ (annual average). See 40 CFR 51.166(b)(15)(i) and (ii). Under the EPA's existing regulations, the establishment of a baseline area for any PSD increment results from the submission of the first complete PSD permit application and is based on the location of the proposed source and its emissions impact on the area. Once the baseline area is established, subsequent PSD sources locating in that area need to consider that a portion of the available increment may have already been consumed by previous emissions increases. In general, the submittal date of the first complete PSD permit application in a particular area is the operative "baseline date."³ On or before the date of the first complete PSD application, emissions generally are considered to be part of the baseline concentration, except for certain emissions from major stationary sources. Most emissions increases that occur after the baseline date will be counted toward the amount of increment consumed. Similarly, emissions decreases after the baseline date restore or expand the amount of increment that is available. See 75 FR 64864. As described in the $\text{PM}_{2.5}$ PSD Increment—SILs—SMC Rule, pursuant to the authority under section 166(a) of the CAA the EPA promulgated numerical increments for $\text{PM}_{2.5}$ as a new pollutant⁴ for which the

³ Baseline dates are pollutant specific. That is, a complete PSD application establishes the baseline date only for those regulated NSR pollutants that are projected to be emitted in significant amounts (as defined in the regulations) by the applicant's new source or modification. Thus, an area may have different baseline dates for different pollutants.

⁴ The EPA generally characterized the $\text{PM}_{2.5}$ NAAQS as a NAAQS for a new indicator of PM. The EPA did not replace the PM_{10} NAAQS with the NAAQS for $\text{PM}_{2.5}$ when the $\text{PM}_{2.5}$ NAAQS were promulgated in 1997. The EPA rather retained the annual and 24-hour NAAQS for PM_{10} as if $\text{PM}_{2.5}$ was a new pollutant even though the EPA had already developed air quality criteria for PM generally. See 75 FR 64864 (October 20, 2010).

NAAQS were established after August 7, 1977,⁵ and derived 24-hour and annual PM_{2.5} increments for the three area classifications (Class I, II and III) using the “contingent safe harbor” approach. See 75 FR 64864 at 64869 and table at 40 CFR 51.166(c)(1).

In addition to PSD increments for the PM_{2.5} NAAQS, the PM_{2.5} PSD Increment—SILs—SMC Rule amended the definition at 40 CFR 51.166 and 52.21 for “major source baseline date” and “minor source baseline date” to establish the PM_{2.5} NAAQS specific dates (including trigger dates) associated with the implementation of PM_{2.5} PSD increments. See 75 FR 64864. In accordance with section 166(b) of the CAA, the EPA required the states to submit revised implementation plans adopting the PM_{2.5} PSD increments to the EPA for approval within 21 months from promulgation of the final rule (by July 20, 2012). Each state was responsible for determining how increment consumption and the setting of the minor source baseline date for PM_{2.5} would occur under its own PSD program. Regardless of when a state begins to require PM_{2.5} increment analysis and how it chooses to set the PM_{2.5} minor source baseline date, the emissions from sources subject to PSD for PM_{2.5} for which construction commenced after October 20, 2010, (major source baseline date) consume the PM_{2.5} increment and therefore should be included in the increment analyses occurring after the minor source baseline date is established for an area under the state’s revised PSD SIP program.

(b) What are PSD SILs and SMC?

The EPA’s PM_{2.5} PSD Increment—SILs—SMC Rule also established SILs and SMC for the PM_{2.5} NAAQS to address air quality modeling and monitoring provisions for fine particle pollution in areas protected by the PSD program. The SILs and SMC are numerical values that represent thresholds of insignificant, i.e., de minimis, modeled source impacts or monitored

⁵ The EPA interprets 166(a) to authorize the EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which the EPA promulgates a NAAQS after 1977.

(ambient) concentrations, respectively. The de minimis principle is grounded in a decision described by the court case *Alabama Power Co. v. Costle*, 636 F.2d 323, 360 (D.C. Cir. 1980). In this case reviewing the EPA's 1978 PSD regulations, the court recognized that "there is likely a basis for an implication of de minimis authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." 636 F.2d at 360. The EPA established such values for PM_{2.5} in the PM_{2.5} PSD Increment—SILs—SMC rule to be used as screening tools by a major source subject to PSD to determine the subsequent level of analysis and data gathering required for a PSD permit application for emissions of PM_{2.5}. See 75 FR 64864. As part of the response to comments in the PM_{2.5} PSD Increment—SILs—SMC Rule final rulemaking, the EPA explained that the agency considers that the SILs and SMC used as de minimis thresholds for the various pollutants are useful tools that enable permitting authorities and PSD applicants to screen out "insignificant" activities; however, the fact remains that these values are not required by the Act as part of an approvable SIP program.

(c) SILs-SMC Litigation

The PM_{2.5} SILs and SMC were subject to litigation before the U.S. Court of Appeals. (*Sierra Club v. EPA*, Case No. 10-1413, D.C. Circuit). In response to the litigation, the EPA filed a brief on April 6, 2012, which contained a request that the Court vacate and remand to the EPA portions of two PSD PM_{2.5} rules (40 CFR 51.166 and 40 CFR 52.21) addressing the PM_{2.5} SILs so that the EPA could voluntarily correct errors in those provisions. On January 22, 2013, the Court granted the EPA's request for vacature and remand of the PM_{2.5} SILs provisions and also vacated parts of 40 CFR 51.166 and 40 CFR 52.21 that established the PM_{2.5} SMC, finding that the EPA was precluded from using the PM_{2.5} SMC to exempt permit applicants from the statutory requirement to compile preconstruction monitoring data. As a result of the Court's

decision, States should avoid including language in SIP revision submittals that are the same as or have similar effects as the vacated PM_{2.5} SILs and SMC language in 40 CFR 51.166 and 52.21. As stated previously, neither the PM_{2.5} SILs nor the PM_{2.5} SMC are required elements of the PSD SIP for PM_{2.5}.

New Mexico's July 26, 2013, SIP revision submittal includes revisions to 20.11.61 NMAC that incorporate the amendments to the PSD regulations consistent with the changes in the 2010 PM_{2.5} PSD Increment—SILs—SMC Rule. Consistent with the January 2013 vacature and remand by the U.S. Court of Appeals for the D.C. Circuit (the D.C. Circuit), the SIP revision submittal also correctly excludes those amendments from the EPA's 2010 Rule that established the PM_{2.5} SILs and SMC. Therefore, the EPA finds that these revisions in the July 2013 submittal are consistent with the 2010 rulemaking and subsequent Court decision and meet the requirements of section 110 and part C of the CAA.

iii. Summary of the EPA's 2012 PM_{2.5} NSR Implementation Rule

On October 12, 2012, the EPA finalized amendments to its rules for the CAA NSR permitting program regarding the definition of "regulated NSR pollutant." This rulemaking clarified when condensable particulate matter should be measured. The final rule continued to require that condensable particulate matter be included as part of the emissions measurements for regulation of PM_{2.5}/PM₁₀. As a result of the EPA's final 2012 NSR PM_{2.5} Rule, the inadvertent requirement that measurements of condensable particulate matter emissions be included as part of the measurement and regulation of "particulate matter emissions" was removed.

New Mexico's July 26, 2013, SIP revision submittal includes a revision to the definition of "regulated NSR pollutant." Specifically, the SIP revision revises this definition found at 20.11.61.7(WW) NMAC to include the clarifying language related to the condensable particulate

matter portion accounted for in PM_{2.5} and PM₁₀ emissions. The EPA notes that as part of the July 2013 SIP revision submittal, New Mexico did not remove the requirement for condensable particulate matter emissions to be included in particulate matter emissions. Therefore, the definition of “regulated NSR pollutant” at 20.11.61.7(WW) NMAC is more stringent than the federal definition. See 40 CFR 51.166(b)(49). The EPA finds that the revisions to the definition of “regulated NSR pollutant” in the July 26, 2013, submittal meet the federal requirements in that the definition is more stringent than the federal definition.

iv. Summary of the EPA’s 2011 Fugitives Interim Rule

On March 8, 2011, the EPA issued an interim rule to stay a December 2008 rule known as the Fugitives Emissions Rule. The 2008 Rule established new provisions for how fugitive emissions should be treated for NSR permitting. The EPA’s 2011 interim rule replaced the stay issued by the EPA on March 31, 2010, which inadvertently covered portions of the NSR permitting requirements that should not have been stayed. The 2011 rulemaking stayed the 2008 Fugitive Emissions Rule as originally intended and reverted the regulatory text back to the language that existed prior to those amendments, which the EPA is reconsidering in response to a 2009 Natural Resources Defense Council petition for reconsideration of the 2008 Fugitive Emissions Rule.

New Mexico’s July 26, 2013, SIP revision submittal includes revisions to 20.11.61 NMAC that incorporate the amendments to the PSD regulations consistent with the changes in the 2011 Fugitives Interim Rule. The EPA finds that these revisions in the July 2013 submittal are consistent with the 2011 rulemaking and meet the requirements of section 110 and part C of the CAA.

v. Summary of the the EPA’s 2011 Biomass Deferral Rule

On July 20, 2011, the EPA promulgated the Biomass Deferral Rule, which deferred, for a period of three years, the application of the PSD and title V permitting requirements to CO₂ emissions from bioenergy and other biogenic stationary sources. See 76 FR 43490. On July 12, 2013, the U.S. Court of Appeals for the D.C. Circuit issued its decision to vacate the Biomass Deferral Rule. See *Center for Biological Diversity v. EPA* (D.C. Cir. No. 11-1101).

New Mexico's July 26, 2013, SIP revision submittal includes revisions to 20.11.61 NMAC that incorporate the 2011 Biomass Deferral Rule into the Albuquerque-Bernalillo County PSD program. However, as discussed in this proposed rulemaking, New Mexico's March 4, 2015, SIP Submittal contains revisions to update the PSD program to remove the biomass deferral, which was vacated in 2013. The EPA finds that the combined revisions from the July 2013 and March 2015 submittals are consistent with current PSD regulations with respect to the vacated Biogas Referral Rule and meet the requirements of section 110 and part C of the CAA.

vi. Summary of the the EPA's 2012 Tailoring Rule and GHG PALs Rule

On June 3, 2010, the EPA issued a final rule, known as the Tailoring Rule, which phased in permitting requirements for GHG emissions from stationary sources under the CAA PSD and title V permitting programs (75 FR 31514). For Step 1 of the Tailoring Rule, which began on January 2, 2011, PSD or title V requirements applied to sources of GHG emissions only if the sources were subject to PSD or title V "anyway" due to their emissions of non-GHG pollutants. These sources are referred to as "anyway sources." Step 2 of the Tailoring Rule, which began on July 1, 2011, applied the PSD and title V permitting requirements under the CAA to sources that were classified as major, and, thus, required to obtain a permit, based solely on their potential GHG emissions and to modifications of otherwise major sources that required a PSD permit because they increased only GHG above applicable levels in the EPA regulations.

On July 12, 2012, the EPA promulgated the final “Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3 and GHG Plantwide Applicability Limits” (GHG Tailoring Rule Step 3 and GHG PALs).⁶ 77 FR 41051. In the Tailoring Rule Step 3 portion of this rule, the EPA decided against further phase in of the PSD and title V requirements to apply to sources emitting lower levels of greenhouse gas emissions. Thus, the thresholds for determining PSD applicability based on emission of greenhouse gases remained the same as established in Step 2 of the Tailoring Rule. The Step 3 portions of the EPA’s July 12, 2012, final rule are not relevant to today’s proposed action on the New Mexico SIP revision.

The GHG PALs portion of the July 12, 2012, final rule promulgated revisions to the EPA regulations under 40 CFR part 52 for establishing PALs for GHG emissions. For a full discussion of the EPA’s rationale for the GHG PALs provisions, see the notice of final rulemaking at 77 FR 41051. A PAL establishes a site-specific plantwide emission level for a pollutant that allows the source to make changes at the facility without triggering the requirements of the PSD program, provided that emissions do not exceed the PAL level. Under the EPA’s interpretation of the federal PAL provisions, such PALs are already available under PSD for non-GHG pollutants and for GHGs on a mass basis, and the EPA revised the PAL regulations to allow for GHG PALs to be established on a carbon dioxide equivalent (CO₂e) basis as well. See 77 FR 41052. The EPA finalized these revisions in an effort to streamline

⁶ For a complete history of the EPA’s rulemakings related to GHG emissions please review the following final actions:

“Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act.” 74 FR 66496 (December 15, 2009).

“Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs.” 75 FR 17004 (April 2, 2010).

Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule.” 75 FR 25324 (May 7, 2010).

Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule; Final Rule.” 75 FR 31514 (June 3, 2010).

federal and SIP PSD permitting programs by allowing sources and permitting authorities to address GHGs using a PAL in a manner similar to the use of PALs for non-GHG pollutants. See 77 FR 41051, 41052.

II. The EPA's Evaluation

New Mexico's July 26, 2013, and March 4, 2015, SIP revision submittals include amendments to the Albuquerque-Bernalillo County PSD program found in 20.11.61 NMAC to incorporate changes to federal PSD provisions resulting from the following EPA rulemakings: 2008 NSR PM_{2.5} Rule, 2010 PM_{2.5} PSD Increment—SILs—SMC Rule, 2012 PM_{2.5} PSD Implementation Rule, 2011 Fugitives Interim Rule, 2011 Biomass Deferral Rule, and 2012 GHG Tailoring Rule Step 3 and GHG PALs Rule. The July 26, 2013, SIP revisions also contains additional non-substantive revisions to 20.11.61 NMAC including formatting revisions, inclusion of acronyms, and rewording of provisions to make this Part consistent with other provisions of the NMAC.

On June 23, 2014, the United States Supreme Court, in *Utility Air Regulatory Group v. Environmental Protection Agency*,⁷ issued a decision addressing the application of PSD permitting requirements to GHG emissions. The Supreme Court said that the EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source (or modification thereof) required to obtain a PSD permit. The Court also said that the EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of Best Available Control Technology (BACT). The Supreme Court decision effectively upheld PSD permitting

⁷134 S.Ct. 2427 (2014).

requirements for GHG emissions under Step 1 of the Tailoring Rule for “anyway sources” and invalidated PSD permitting requirements for Step 2 sources.

In accordance with the Supreme Court decision, on April 10, 2015, the D.C. Circuit issued an amended judgment vacating the regulations that implemented Step 2 of the Tailoring Rule, but not the regulations that implement Step 1 of the Tailoring Rule. A copy of the judgment is included in the docket to this rulemaking.⁸ The amended judgment preserves, without the need for additional rulemaking by the EPA, the application of the Best Available Control Technology (BACT) requirement to GHG emissions from sources that are required to obtain a PSD permit based on emissions of pollutants other than GHGs (“anyway” sources). The D.C. Circuit’s judgment vacated the regulations at issue in the litigation, including 40 CFR 51.166(b)(48)(v), “to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification.”

The EPA may need to take additional steps to revise federal PSD rules in light of the Supreme Court decision and recent D.C. Circuit judgment. In addition, the EPA anticipates that many states will revise their existing SIP-approved PSD programs. The EPA is not expecting states to have revised their existing PSD program regulations at this juncture. However, the EPA is evaluating PSD program submissions to assure that the state’s program correctly addresses GHGs consistent with both decisions.

New Mexico’s existing approved SIP for the Albuquerque-Bernalillo County PSD program contains the greenhouse gas permitting requirements required under 40 CFR 51.166, as

⁸ Original case is *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322, 06/26/20, judgment entered for No. 09-1322 on 04/10/2015.

amended in the Tailoring Rule. As a result, the Albuquerque-Bernalillo County's SIP-approved PSD permitting program continues to require that PSD permits (otherwise required based on emissions of pollutants other than GHGs) contain limitations on GHG emissions based on the application of BACT when sources emit or increase greenhouse gases in the amount of 75,000 tons per year (tpy), measured as carbon dioxide equivalent. Although the SIP-approved Albuquerque-Bernalillo County PSD permitting program may also currently contain provisions that are no longer necessary in light of the D.C. Circuit's judgment or the Supreme Court decision, this does not prevent the EPA from approving the submission addressed in this rule. New Mexico's July 26, 2013, and March 4, 2015, SIP submissions do not add any greenhouse gas permitting requirements that are inconsistent either decision.

Likewise, this revision does add to the New Mexico SIP for the Albuquerque-Bernalillo County PSD program elements of the EPA's July 12, 2012, rule implementing Step 3 of the phase in of PSD permitting requirements for greenhouse gases described in the Tailoring Rule, which became effective on August 13, 2012. Specifically, the incorporation of the Step 3 rule provisions will allow GHG-emitting sources to obtain PALs for their GHG emissions on a CO₂e basis. The GHG PAL provisions, as currently written, include some provisions that may no longer be appropriate in light of both the D.C. Circuit's judgment and the Supreme Court decision. Since the Supreme Court has determined that sources and modifications may not be defined as "major" solely on the basis of the level of greenhouse gases emitted or increased, PALs for greenhouse gases may no longer have value in some situations where a source might have triggered PSD based on greenhouse gas emissions alone. However, PALs for GHGs may still have a role to play in determining whether a modification that triggers PSD for a pollutant other than greenhouse gases should also be subject to BACT for greenhouse gases. These

provisions, like the other GHG provisions discussed previously, may be revised at some future time. However, these provisions do not add new requirements for sources or modifications that only emit or increase greenhouse gases above the major source threshold or the 75,000 tpy greenhouse gas level in section 52.21(b)(49)(iv). Rather, the PALs provisions provide increased flexibility to sources that wish to address their GHG emissions in a PAL. Since this flexibility may still be valuable to sources in at least one context described above, we believe that it is appropriate to approve these provisions into the New Mexico SIP at this juncture.

As discussed in this rulemaking and the accompanying TSD, the EPA finds that the revisions to the Albuquerque-Bernalillo County PSD program contained in the July 26, 2013, and March 4, 2015, SIP revision submittals are consistent with the aforementioned the EPA rulemakings and meet the associated federal requirements. The EPA therefore proposes to find the proposed SIP revisions to be fully approvable.

III. Proposed Action

The EPA is proposing to approve revisions to the Albuquerque-Bernalillo County PSD program that were submitted by New Mexico as a SIP revision on July 26, 2013, and March 4, 2015. We are proposing approval of the portions of the July 26, 2013, and March 4, 2015, submittals that revised the following sections under 20.11.61:

- 20.11.61.2 NMAC – Scope,
- 20.11.61.5 NMAC – Effective Date,
- 20.11.61.6 NMAC – Objective,
- 20.11.61.7 NMAC – Definitions,
- 20.11.61.10 NMAC – Documents,
- 20.11.61.11 NMAC – Applicability,

- 20.11.61.12 NMAC – Obligations of Owners or Operators of Sources,
- 20.11.61.14 NMAC – Control Technology Review and Innovative Control Technology,
- 20.11.61.15 NMAC – Ambient Impact Requirements,
- 20.11.61.18 NMAC – Air Quality Analysis and Monitoring Requirements,
- 20.11.61.20 NMAC – Actuals Plantwide Applicability Limits (PALs),
- 20.11.61.23 NMAC – Exclusions from Increment Consumption,
- 20.11.61.24 NMAC – Sources Impacting Federal Class I Areas-Additional Requirements,
- 20.11.61.27 NMAC – Table 2-Significant Emission Rates,
- 20.11.61.29 NMAC – Table 4-Allowable PSD Increments, and
- 20.11.61.30 NMAC – Table 5-Maximum Allowable Increases for Class I Variances.

The EPA has determined that these revisions to the New Mexico SIP's Albuquerque-Bernalillo County PSD program are approvable because the submitted rules are adopted and submitted in accordance with the CAA and are consistent with the EPA regulations regarding PSD permitting. The EPA is proposing this action under section 110 and part C of the Act.

The EPA is severing from our proposed approval action the revisions to 20.11.60 NMAC submitted on July 26, 2013, which are revisions to the Albuquerque-Bernalillo County NNSR Program and will be addressed in a separate action.

IV. Incorporation by Reference

In this rule, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference the New Mexico regulations discussed in section III. of this preamble. The EPA has made, and will continue to make, these documents generally

available electronically through www.regulations.gov and/or in hard copy at the appropriate EPA office (see the ADDRESSES section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a “significant regulatory action” subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide the EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule is not proposed to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: April 24, 2015.

Ron Curry,
Regional Administrator, Region 6.

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